No. 78-1870

In the Supreme Court of the United States

OCTOBER TERM, 1978

WHIRLPOOL CORPORATION, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 593 F. 2d 715. The opinion of the district court is reported at 416 F. Supp. 30 (Pet. App. A43-A49).

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1979, and a petition for rehearing was denied on April 4, 1979 (Pet. App. A40-A42). The petition for a writ of certiorari was filed on June 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in implementing the Occupational Safety and Health Act of 1970, the Secretary of Labor may proscribe

employer retaliation against an employee for his refusal to perform particular tasks he reasonably believes present an immediate danger of death or serious injury.

STATEMENT

This suit was brought by the Secretary of Labor under Section 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c)(1) (OSHA), which forbids any discrimination against an employee "because of the exercise by such employee * * * of any right afforded by this Act."[1] The Secretary alleged that petitioner had violated 29 C.F.R. 1977.12, a Department of Labor regulation implementing Section 11(c)(1) that protects an employee, in narrowly limited circumstances, from employer retaliation for the employee's refusal to perform assigned tasks that he reasonably believes would subject him to serious injury or death.[2]

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[1]Section 11(c)(2) of the Act, 29 U.S.C. 660(c)(2), directs the Secretary to investigate employee complaints of violations of Section 11(c)(1) and, if he finds a complaint justified, to bring suit against the employer. Section 11(c)(2) further provides that the district courts "shall have jurisdiction * * * to restrain violations of [Section 11(c)(1)] and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."

[2]In pertinent part, 29 C.F.R. 1977.12 provides:

> (b)(1) * * * [R]eview of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace.
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> * * * * *
>
> (2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

The record discloses that petitioner operates a manufacturing plant in Marion, Ohio, to produce household appliances. The appliance components are transported in the plant on overhead conveyors. Wire mesh guard screens some 20 feet above the plant floor protect the workers from parts that occasionally drop off the conveyors (Pet. App. A5; J.A. 20-22).[3] Maintenance employees remove fallen parts from the screens, replace papers spread on the screens to catch grease drippings, and provide necessary maintenance on the conveyors. These duties require the employees to walk on the screens (*ibid.*).[4]

Petitioner began replacing the original mesh screens in 1973, after several workers fell through them (J.A. 21, 41, 48-49, 52-53, 68-69, 73, 102). By mid-1974, about one third of the original screening had been replaced with heavier, more securely attached screens, which were safer to walk on (J.A. 19, 21, 54, 100, 138, 153-154, 160-163, 179). On June 28, 1974, a maintenance employee fell to his death through a section where the stronger wire mesh had not yet been installed (J.A. 26, 35, 100, 127, 140). As

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[3]"J.A." refers to the joint appendix in the court of appeals.

[4]The maintenance force consists of 88 men, who spend a total of 15 to 30 man hours a week on the screens (J.A. 22, 101). Work on the screens is apparently highly intermittent for any single employee (see, *e.g.*, J.A. 36-37, 46-47, 67, 77-78, 81-83).

a result of that accident, an OSHA inspector visited petitioner's plant and issued a citation on July 9, 1974, charging petitioner with failing to provide a safe workplace for its employees (J.A. 17, 96-97).[5]

On July 10, 1974, two night shift maintenance employees refused to walk on the old style screening on the ground that it was unsafe (J.A. 147-151, 159-160).[6] The employees had previously complained about the safety of the screening (J.A. 139, 170, 185), and one of them had discussed his concerns with a local OSHA representative (J.A. 144-146). After their refusal to walk on the screens, the employees were placed on disciplinary suspension for the remainder of the shift and were given written reprimands for insubordination (J.A. 15-16, 151, 176).[7]

The district court agreed with the Secretary that the employees' actions were protected by 29 C.F.R. 1977.12(b)(2)—that is, the employees had refused in good faith to perform an assigned task that they reasonably concluded posed a real danger of death or serious injury, in a situation in which there was insufficient time to resort to regular statutory enforcement channels to eliminate the danger and in which correction of the dangerous condition had been unsuccessfully sought from the

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[5]Petitioner's challenge to the citation is currently pending in the United States Court of Appeals for the District of Columbia Circuit (No. 79-1692), after extensive administrative litigation (see Pet. App. A6 n.6).

[6]Petitioner claimed below that the employees' refusal to walk on the screens was motivated by a desire for higher pay. Both lower courts rejected this contention (Pet. App. A5 & n.5, A44-A45), and petitioner does not raise it here.

[7]By virtue of the suspension each employee lost approximately 6 hours' pay, about $25 (J.A. 151, 176).

employer (Pet. App. A46). The court nevertheless denied relief, because it concluded that the regulation exceeded the Secretary's authority under the Act. The court read the legislative history of the Act as demonstrating that "Congress squarely faced the issue as to whether or not employees should be permitted to leave the job when faced with a dangerous situation and decided that they should not" (*id.* at A47).

The court of appeals reversed, holding that the regulation is "a reasonable exercise of the Secretary's authority" (Pet. App. A10), and that it "performs a vital function in rounding out the Act's enforcement provisions" (*id.* at A19). The court carefully considered the legislative history upon which the district court relied and concluded that it was not inconsistent with the Secretary's regulation because the proposals rejected by Congress significantly differed from the narrow protection afforded by the regulation (*id.* at A20-A36).[8]

DISCUSSION

This case presents an important and recurring question concerning the extent of the Secretary of Labor's

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[8]Congress failed to enact a so-called "strike with pay" provision. The Secretary's regulation, however, only protects the employee in his refusal to perform a specific hazardous task; the employer may assign available alternative work or refuse to pay the employee if such work is unavailable (Pet. App. A27-A30). Nothing in this record suggests that there was no work available for the disciplined maintenance workers other than the screen cleaning, which was evidently a minor part of their job (see note 4, *supra*).

The congressional rejection of a proposal permitting the closing by administrative order of workplaces presenting an imminent danger to employees was also based on concerns not implicated by the Secretary's regulation--namely, the possibility of "arbitrary governmental authority brought to bear on an employer to take certain action" (Pet. App. A35).

authority under the Occupational Safety and Health Act to ensure the protection of workers faced with imminently dangerous employment conditions. The courts of appeals have disagreed as to the validity of the Secretary's regulation. Although we believe that the court below correctly decided the issue against petitioner, we do not oppose the petition for a writ of certiorari in light of the importance of the question and the conflict among the circuits.

As the court of appeals recognized (Pet. App. A39), its holding is squarely in conflict with that of the Fifth Circuit in *Marshall* v. *Daniel Construction Company*, 563 F. 2d 707, cert. denied, No. 77-1697 (Oct. 2, 1978). The instant decision also conflicts with *Marshall* v. *Certified Welding Corp.*, [1979 Transfer Binder] Empl. Safety & Health Guide (CCH) para. 23,257 (10th Cir. Dec. 28, 1978), in which the court of appeals relied on *Daniel Construction Company* and the district court's opinion in this case. The same issue is currently pending in the Seventh Circuit in *Marshall* v. *N.L. Industries*, No. 78-2289.

The reasons for our conclusions that the question presented by this case is important and that the Secretary's regulation is a valid exercise of his statutory authority are summarized in the petition for a writ of certiorari in *Marshall* v. *Daniel Construction Company*, *supra*.[9] As we observed in that petition (pages 9-10), "a limited right to self-help is necessary to deal with extreme situations for which the administrative and judicial processes are too slow, unless workers are to be left with the cruel choice between their safety and their job."

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[9]We are sending petitioner a copy of our petition in *Daniel Constuction Company*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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